SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-332

No. ~~1878~~

JOSEPH H. UHRIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT S. BAILEY,
53 West Jackson Blvd.
Chicago, Illinois

RONALD P. ALWIN,
39 South La Salle Street
Chicago, Illinois

Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Joseph Uhrig respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered below on May 24, 1971.

OPINIONS BELOW

The judgment and opinion of the United States District Court for the Northern District of Illinois is not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit entered on May 24, 1971, is not yet officially reported and is printed as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the district court was entered on May 24, 1971. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner knowingly and intelligently waived his Sixth Amendment right to counsel where the record demonstrates failure of petitioner to understand the charges against him or to appreciate the nature of the criminal process.

2. Whether the trial court abused its discretion in not appointing counsel to assist petitioner or in failing to terminate the proceedings when it became apparant that petitioner was incompetent to represent himself and was thereby being denied the effective assistance of counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT

Petitioner Uhrig was charged along with co-defendant Price in a nine-count indictment with devising and executing a scheme to defraud by means of false and fraudulent pretenses through use of the mails (in violation of 18 U.S.C. 1341). After counsel for petitioner Uhrig had withdrawn from a previously pending indictment charging the same offenses (67 CR 648) and the instant indictment had been returned, petitioner's several *pro se* motions to dismiss the indictment (R. 22) were each and all denied. (R. 27, 59). Co-defendant Price's motion for severance was granted (R. 18).* Subsequently, the case against co-defendant Price, who was represented by counsel, was dismissed on motion of the government.

Petitioner, representing himself, waived a jury and was tried to the court. Upon motion of the government, count six was dismissed (R. 79), judgment of conviction was entered upon a finding of guilty as to all remaining courts of the indictment and petitioner was committed to the custody of the Attorney General of the United States for a period of eighteen months. (R. 86).

The judgment was affirmed by the Court of Appeals for the Seventh Circuit, which held relative to the contention that petitioner was denied the effective assistance of counsel, that the record showed ". . . no abuse of discretion and precludes any notion that Uhrig's waiver of his Sixth Amendment right was not knowingly or intelligently made or that he was denied due process of law." (App., p. A7).

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*"R" refers to the one volume of pleadings usually referred to as the "common law record."

The statement of facts set forth in the opinion of the lower court, printed as an appendix to this petition, is sufficient to an understanding of the issues raised in this petition, except where supplemented in the statement of the reason for granting the writ by certain additional facts deemed essential to petitioner's contentions.

REASONS FOR GRANTING THE WRIT

The Writ Should Be Granted To Further Define The Standards Governing Waiver Of The Sixth Amendment Right To Counsel And To Decide Whether It Was An Abuse Of Discretion For The Trial Court To Refuse To Appoint Counsel Or Terminate The Proceedings When It Became Apparent That Petitioner Was Denied The Effective Assistance Of Counsel.

Petitioner Uhrig respectfully urges this Court to review the judgment of the lower court holding that petitioner, representing himself, was not denied his Sixth Amendment right to effective assistance of counsel and knowingly and intelligently waived the same, and, in further defining the scope of the Sixth Amendment right to counsel, consider and define the circumstances under which there may be a "knowing and intelligent" waiver of the right to effective assistance of counsel at trial. In urging upon this Court such an undertaking, petitioner points out that this Court has given scant attention to the circumstances surrounding a "knowing and intelligent" waiver of counsel and, to the best of our knowledge, has yet to consider the question of whether an unknowing defendant may proceed *pro se* consistent with the Constitutional guarantee of effective assistance of counsel. The appropriateness and need for further explication of the important right to counsel is supported not only by the facts of this case, but also by recent decisions of this Court defining and further explicating other

important rights under the Fourth, Fifth and Sixth Amendments to the Constitution. E.g., *Miranda* v. *Arizona,* 384 U.S. 436 (Fifth Amendment privilege against self incrimination); *Escobedo* v. *Illinois,* 378 U.S. 478 (Sixth Amendment right to counsel); *Cheff* v. *Schnackenberg,* 384 U.S. 373, *Bloom* v. *Illinois,* 386 U.S. 1003 (Sixth Amendment right to trial by jury); *McCarthy* v. *United States,* 394 U.S. 459 (Sixth Amendment right to confrontation of witnesses).

The principal contention of petitioner is that in deciding his Sixth Amendment right to counsel and deciding to represent himself he did not and under the circumstances could not have executed a "knowing and intelligent" waiver and that he was therefore denied the right to effective assistance of counsel in violation of the Sixth Amendment. *Powell* v. *Alabama,* 287 U.S. 45; *Johnson* v. *Zerbst,* 304 U.S. 458. This contention is perhaps best supported by the trial court's observation, when petitioner sought leave to proceed *pro se,* that "You do not know what you are into." T.*, January 19, 1968, p. 3. Petitioner's argument is essentially twofold:

a) There can be no knowing and intelligent waiver of counsel without full warnings and understanding of the charges against a defendant and the consequences of waiver.

b) Whenever it becomes apparent that a defendant proceeding *pro se* is, by representing himself, being denied the effective assistance of counsel, the trial court should appoint counsel to assist him, terminate the proceedings or otherwise assure effective assistance of counsel.

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*"T" is used herein to designate the transcript of trial and pretraial proceedings. Unless otherwise specified by date, references are to the five-volute, 827-page transcript of trial proceedings.

These contentions are developed more fully below.

a) The Need For Standards Governing Waiver Of The Right To Counsel

While this Court recognized twenty years ago in *Johnson* v. *Zerbst*, 304 U.S. 458 the importance of the Sixth Amendment right to effective assistance of counsel, the Court has yet to define and establish standards governing a knowing and intelligent waiver of the right to counsel. Save for the proposition that waiver will not be presumed from a silent record (*Johnson* v. *Zerbst*, 304 U.S. 458; *Gideon* v. *Wainright*, 372 U.S. 335), the standards attendant upon waiver of the right to counsel remain undefined in an age when there appears to be an increasing tendency of some defendants to attempt self-representation.*

The mere ritualistic admonition even when made repeatedly, that a defendant has the right to retained or appointed counsel, obviously will not suffice where, as here, there is a lack of understanding, demonstrated during trial, of the role counsel might appropriately play, of the rules of evidence, and of the fundamental nature of the charges themselves. This approach to the important right to counsel is inconsistent with the careful attention given to the type of warnings attendant upon waiver of the Fifth Amendment privilege against self-incrimination and the rights to trial by jury or by the court, confrontation of witnesses, and understanding of the nature of the charges. See *Miranda* v. *Arizona*, 384 U.S. 436; *McCarthy* v. *United States*, 394 U.S. 459.

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*Particularly is this so in certain trails, characterized by defendants as "political" in nature.

In view of the careful and detailed warnings and necessary understanding attendant upon waiver of these rights, is not a greater understanding required where these rights are not waived but where a defendant *pro se* seeks to exercise these rights by conducting a trial? It is suggested that counsel should have been appointed at least to advise petitioner of his rights and of the services counsel could perform, in view of the sprawling nature of the mail fraud charge, before he decided to proceed *pro se;* in other words, implicit in the concept of knowing and intelligent waiver of the right to counsel is the suggestion that this right can only be knowingly and intelligently waived upon the advice of counsel. Consistent with this contention is the observation of Mr. Justice Stewart during oral argument in *Miranda*:

> "It would seem that one would have to have a lawyer to waive a lawyer." 34 L.W. 3299

Similarly, Mr. Justice White posited the following question to the Solicitor General, who entered an appearance in the case on behalf of the United States:

> "But without a lawyer? How does he know his rights without a lawyer?" 34 L.W. 3299

Recognizing the importance of the premise upon which the question was founded, the Solicitor General, then Mr. Justice Marshall, responded:

> "It depends upon the individual." 34 L.W. 3299

Applying the standard suggested by Solicitor General Marshall—i.e., that it depends upon the individual—it is clear from the record, as more specifically demonstrated below in point (b), that petitioner Uhrig was an individual who did not fully understand the nature of the charges against him, did not understand the criminal process and proved himself incompetent to defend against

the charges against him. The trial court might have remedied the situation by appointing counsel to advise petitioner *before* he waived his right to counsel. Failure to do so resulted in a denial to petitioner of the effective assistance of counsel.

This Court should therefore grant the writ and consider and decide in further explication and definition of the Sixth Amendment right to counsel when and under what circumstances there may be an effective waiver of the right.

b) The Trial Court Should Have Appointed Counsel To Assist Petitioner Or Should Have Terminated The Proceedings When It Became Apparent That Petitioner Was Incompetent To Represent Himself.

Appreciating that under applicable law the trial court could allow petitioner to proceed with his own defense, it is submitted that it was an abuse of discretion not to terminate the proceedings when it became apparent that petitioner was incompetent to defend against the complex nine-count indictment and that in failing to do so the trial court ignored his ". . . duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser* v. *United States*, 315 U.S. 60, 71.*

Petitioner's contention here is best appreciated by reference to the record in the trial court. To begin with, the charges against petitioner were not simple. An indictmen charging mail fraud is difficult enough for a lawyer or a judge to analyze. To a layman who has the dis-

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* *To the same effect, this Court observed in *Powell* v. *Alabama*, 287 U.S. 45, 52: "It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial."

advantage of personal involvement and the concomitant inability to gain perspective on the case, its comprehension becomes a virtually impossible task. Mail fraud is a sprawling and nebulous charge always difficult to confine within manageable limitations. For even the most experienced advocate at the criminal bar it is among the very most difficult charges to defend. That kind of charge and its nuances require intensive analysis and most demanding scholarship if it is to be successfully met. The nature of guilt in a mail fraud case is a very elusive concept indeed. Particularly is this so in a case as this where the evidence is close and the line between mere puffing and outright fraud is as difficult of definition as it is in this one.

The following specific instances demonstrate unquestionably petitioner's lack of effectiveness as his own counsel and his failure to understand not only the charges against him but the very nature of the criminal process itself.

1. The document petitioner filed as an "answer" to the indictment, an 8-page, single-spaced, typewritten document setting forth his version of the facts far in advance of trial. R. 59. No responsible attorney would have ever permitted his client to file such a pleading.

2. Petitioner's so-called motion to waive a jury trial, R. 25, is another example of the same failure to comprehend his legal position. It is quite clear that he felt the waiver of a jury would be taken by the court as a positive indication of his innocence of the charges against him. To one trained in the law, such a thought immediately appears as sheer nonsense.

3. Another example of the petitioner's inability to represent himself is his final argument to the trial court. T. 800-808. We think that the record shows conclusively that the same kind of thinking constituted the precise reason for the petitioner's decision to represent himself rather than retain counsel or accept the court's appointment of counsel to defend him. Again, we contend, the petitioner labored under the basic misconception that lawyers and juries and constitutional rights were for individuals who were guilty and had something to conceal. He felt that his failure to insist upon the time-tested procedures guaranteed by the Constitution of the United States would be taken as a positive indication of innocence. We cannot conceive of a point of view on a criminal trial which could be more dangerously misleading.

4. The failure of petitioner to object to the testimony of the four franchises, who were nowhere named in the indictment which listed count mailings to and from clients only, underscores our contention that he did not understand the sprawling nature of the charge of mail fraud or more importantly the evidence which would be adduced in support of it. Arguably, the testimony of the franchisees was inadmissible because petitioner was never placed on notice that he would have to rebut any alleged misrepresentations made in connection with the sale of franchises or more importantly any misrepresentations made by the franchises themselves. A lawyer might have successfully excluded or in the alternative anticipated this testimony. Petitioner clearly did not. The confusion in the proof is apparent by the observation of the trial court when after 230 pages of testimony the government finally introduced testimony relative to one of the count mailings, the court said "I have just been waiting for

somebody named in the indictment to show up." T. 231. If the court was confused as to what the government was purporting to show, how could the petitioner understand what was occurring?

5. Petitioner was obviously painfully unaware of his right to object to conversations occurring out of his presence and did not know how to protect himself against such testimony. During the testimony of one witness, for example, as to a conversation with one Scheare, petitioner stated:

> "Mr. Uhrig: May I raise a point, your Honor, just for information.
>
> The Court: You certainly may, yes.
>
> Mr. Uhrig: Thank you, sir.
>
> Relative to this, Mr. Scheare—and to the court witnesses that will be coming along—there is an important statement in our franchise agreement with the franchisees, and *not being a lawyer I don't know how to put it in the information,* I beg your indulgence." (emphasis supplied)

Petitioner then proceeded to read into evidence a statement from the franchise agreement that World Enterprises, Inc. shall not be liable for oral representations of the franchisee. T. 217. Did he believe this would prevent him from going to jail? Apparently so. Nor was petitioner aware of the agency principles relied upon by the government and the need for proof of agency. T. 216.

6. Petitioner obviously had difficulty presenting his own testimony. As he stated at p. 548, perhaps finally realizing that he should have accepted counsel:

> "See, I am a witness and an attorney, too, here. This is rough."

7. Petitioner, showing his complete ignorance of the criminal process and indeed the very nature of a defense to charges made by the government, asked as he began his testimony if it was permissible to refer during his testimony to the testimony placed in evidence by the government. T. 496. How else indeed would he present a defense or rebut the charges? Yet he did not know this simple fact.

8. Petitioner obviously did not know how to handle the 3500 statements. Asking if he could challenge these statements, which he characterized as "sworn," petitioner was told only that these would not be seen by the court. T. 49. An attorney could and would obviously know how to make effective use of contradictions, lies or for that matter favorable material by impeachment or calling the agents who wrote the reports. Petitioner obviously did not possess this degree of sophistication.

9. Petitioner wholly failed to attempt to impeach the witnesses against him by bringing out possible bias or asking about possible threatened prosecution of them for their part in the alleged scheme and correspondingly any agreement not to prosecute if they would testify against petitioner. We refer here particularly to the testimony of Springer, Carlton and Jordan. Was he not through lack of counsel effectively denied the right to confront the witnesses against him?

10. Failure to call any witnesses in his own behalf indicates that petitioner was quite possibly unaware of this most fundamental right or of the proper manner of exercising it. Was he not through lack of counsel denied the opportunity to exercise his right to compulsory process of witnesses in his defense? This suggestion is supported by the fact that although petitioner had an

impressive background and no criminal record, not a single character witness was called in a case which most appropriately called for such testimony in support of his defense of lack of intent to defraud.

In short, we contend that petitioner's attempt to defend himself was doomed to failure from its inception simply because it was abundantly clear that he lacked the training and experience necessary to so formidable a task. Nowhere has the value of an attorney to a defendant been set forth quite as clearly as in the leading decision on the right to counsel in criminal cases in the federal courts.

> "That which is simply, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious." *Johnson* v. *Zerbst*, 304 U.S. 458, 465.

Obviously to petitioner the criminal process was "intricate, complex and mysterious."

Petitioner concedes that the trial court on several occasions advised petitioner of his right to be represented by counsel and at the conclusion of the trial made the observation, which might be characterized as "self-serving," that petitioner had adequately represented himself. As demonstrated, this is belied by the record.

Consistent with the trial court's duty to protect petitioner, he should not have permitted so unwary a defendant to waive his right to counsel. When it became apparent that petitioner was incompetent to conduct his own defense, the trial court should have forced petitioner to accept counsel.

In this connection it should be observed that there exists a readily available pool of appointed counsel in the Northern District of Illinois, and it has been the

practice of some judges to force counsel upon unwilling defendants, if only to assist them in representing themselves, assistance which would have proved invaluable in the instant case.

An example may be found in *United States* v. *Cole*, 365 F. 2d 57, (7th Cir., 1966), where the trial judge was faced with a situation bearing marked similarities to that in the case at bar. There defendant's trial counsel became ill during the course of a long conspiracy trial. The defendant determined that he would represent himself although he was obviously inadequate to the task and he explicitly rejected the assistance of appointed counsel. Nevertheless, demonstrating a commendable solicitude for the rights of one accused of crime, the trial judge appointed an attorney to serve as co-counsel to advise and protect the particular defendant involved until his own attorney could recover from his illness. There was no reason why the district court could not have appointed such in the case at bar. Such an appointment, we respectfully submit, would have paid handsome dividends in assuring the fairness of the trial and the adequate protection of petitioner's constitutional rights.* Notwithstanding petitioner's rejection of the trial court's offers to appoint counsel for petitioner or in the alternative to appoint counsel to assist petitioner, the court as governor of the trial could and should have forced petitioner to accept the services of appointed counsel to assist him in his defense, if not at the beginning of the trial at

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*Both attorneys who represent petitioner in this Court and whose names appear on this petition have served judges of the same district court as appointed counsel in cases in which defendants have explicitly stated a desire to defend themselves and forgo an attorney's assistance.

least when it became apparent that petitioner could not defend himself. In view of the nature of the charges and what subsequently developed at the trial, the court's admonition to petitioner that "You do not know what you are into" T. 3 (January 19, 1968) ripened into the actuality that petitioner would not and did not have the effective assistance of counsel in his defense. In short, the court should have, as other courts in this district have done, forced petitioner to accept the assistance of court-appointed counsel at both the trial and pre-trial proceedings or at very least should have terminated the proceedings and appointed counsel when it became apparent that petitioner was incompetent to represent himself.

For the foregoing reasons, the trial court violated its duty to see that the trial was ". . . conducted with solicitude for the essential rights of the accused." *Glasser* v. *United States*, 315 U.S. 60, 71.

CONCLUSION

For the reasons urged herein, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit below.

Respectfully submitted,

ROBERT S. BAILEY,
53 West Jackson Blvd.
Chicago, Illinois
(312) 427-6050

RONALD P. ALWIN,
39 South La Salle Street
Chicago, Illinois
(312) AN 3-6051

Attorneys for Petitioner.

In The

United States Court of Appeals

For The Seventh Circuit

No. 17615 September Term, 1970 January Session, 1971

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOSEPH H. UHRIG, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 24, 1971

Before Kiley, Fairchild and Pell, *Circuit Judges.*

Kiley, *Circuit Judge.* Defendant Joseph Uhrig and Robert Price were indicted in eight counts for using the mails in furtherance of a scheme to defraud in violation of 18 U.S.C. § 1341. At trial the government dismissed count six of the indictment. Before trial Price's motion for severance was granted. Uhrig waived a jury trial and the district court, without a jury, found him guilty and imposed a sentence of eighteen months. Uhrig has appealed. We affirm.

Uhrig was the prime mover in the incorporation, on January 23, 1963, of World Executives, Inc. (W. E.) with financial aid from Robert Springer, a retired investment counselor. Uhrig was named president, Price vice-president, and Springer secretary-treasurer. Uhrig, a highly articulate and persuasive former minister of religion,

induced Springer to invest $25,000 to finance the business operation of W. E. The business, in concept, was the recruitment of executives seeking new employment and placing them with companies needing executives. Financial resources were to be Springer's investment and a predicted $12,000 gross per month from $350 each executive client was to pay upon application to W.E. Uhrig and Springer were to receive $2,000 and expenses per month.

Uhrig started quickly. He established an office in Chicago with Springer as manager and another in New York City managed by himself and Price. He traveled to Paris, France, where he arranged with John Young of World Literature Crusade, a religious charitable organization, to serve as W.E. foreign representative. Young's function, according to the evidence, was to receive and forward foreign mail addressed to W.E. Uhrig established new departments and employed department heads in Eastern United States.

Uhrig's business concept, as the district court noted, was laudable. However, his expansive activity and profligate use of W.E. money ran well ahead of the business acumen, available funds and clientele. The Chicago office was suffering from lack of executive clients, and Springer complained to Uhrig. Uhrig flew to Chicago March 1, 1963, and in Springer's presence conducted an interview with a client for the purpose of instructing Springer in the art of "hard sell" which the "changed market" now required. The "hard sell" interview upset Springer who resigned the following week, accusing Uhrig of misrepresentations and lies. Springer was repaid $7,500 of his $25,000 investment.

Now in a fiscal squeeze, Uhrig met with Price, and an educator who had earlier been hired to perform certain consulting services for W.E., and an attorney. A policy of franchising was adopted. Twenty-three or twenty-four franchises were sold in the price range of $7,500-$30,000 between June of 1963 and July of 1964. The franchisees were called "regional directors" of W.E. Application fees of franchise clients were to be divided between the "regional directors" and W.E.

Realization of Uhrig's vision, however, lagged and financial resources dwindled. In order to stimulate the market and satisfy clients and franchisees, Uhrig prepared, or caused preparation of, phonograph records, brochures and newspaper advertisements which told W.E.'s story in extravagant terms. Pressures upon Uhrig from demanding clients and franchisees forced his resignation in July, 1964.

Uhrig's later indictment charged him with devising and executing a scheme to defraud by means of false and fraudulent pretenses through use of the mails. The indictment named nine victims of the scheme, one in each of the counts. All of them testified against Uhrig. Uhrig was the only defense witness. He represented himself at trial. The district court found Uhrig guilty on eight of the counts.

Statements in the phonograph records, brochures and advertisements were alleged to be the substances of the fraudulent scheme. There was ample proof of the use of the mails in their dissemination. Uhrig contends that the material was "either true, puffing or not proven to be false." This may be so as to some statements. The court was not required, however, to take as true statements in the promotional material that W.E.'s founders had been

"in the business" for fifteen years, had offices in every major city in the United States and in foreign cities; dealt with over 25,000 companies in the United States and more than a hundred overseas; had "personal contact with top executives in many major firms and dealt directly at the top level with most major firms;" placed applicants "on almost daily basis," and refunded application fees upon placement, with companies served paying W.E. the requisite commission. Uhrig had but one year's experience in a similar business,[1] Springer had none. W.E. did not have offices in every major United States city and had no foreign offices in the sense intended by the representation.[2] W.E.'s only dealing with companies or top executives in this country or abroad was through reading standard business directories such as Standard and Poor's and Moody's, and sending resumes to, and placing tele-

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1. Uhrig worked for National Executives Search, an executive placement firm, from late 1961 to December, 1962. Prior to that time, he had conducted a religious counseling television program and had worked as a minister in various churches. This, presumably, is the explanation for other statements in the brochures referring to Uhrigh's fifteen years of experience "in the field of human relations."

2. The twelve European addresses used by W.E. were offices of World Literature Crusade, whose contract with W.E. limited it to receiving, translating into English, and forwarding to W.E. any mail it may have received addressed to W.E. and to maintaining W.E. literature for distribution to inquirers. Personnel at these offices were specifically precluded from soliciting executive or corporate clients on behalf of W.E.

phone calls with, company executives listed in the directories.[3]

If Uhrig had placed clients on an "almost daily basis," his original dream might have come true, instead of remaining a dream. However, only five applicants seem to have been placed. The application fees and franchise purchases, plus Springer's investment, enabled W.E. to survive as long as it did. And although Uhrig's initial plan might have been for the employing companies to bear the burden of the placement fee, W.E.'s receipt of only four commissions during the life of W.E. must have made clear to Uhrig by the time the phonograph records were made in October, 1963, that these statements were false. Also Uhrig's credibility on this question is undermined by Springer's testimony that Uhrig told him at the inception of W.E. that the primary income would be fees from executive clients and that any additional placement fees from the companies "would be gravy over and above that." There is no merit in Uhrig's contention that the proven statements were mere puffing.

There is no merit either in Uhrig's contention that the government failed to prove his intent to defraud. The question is one of fact, *United States* v. *McCarthy*, 196 F. 2d 616, 619 (7th Cir. 1952), and the evidence—taken favorably to the government—of the souring of the original laudable scheme, inducing the "hard sell" and the misrepresentations were evidence of the necessary intent. *Lewy* v. *United States*, 29 F. 2d 462 (7th Cir. 1928), *cert. den.* 279 U.S. 850. Neither are we persuaded that the evidence of Uhrig's good faith compelled the district

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3. Witness Carlton, a W.E. employee, did testify on cross-examination of seven specific firms with which the company did directly deal, but these were not "major firms," much less "most major firms."

court to find equally consistent inferences of guilt and innocence so as to preclude the guilty inference.

Finally we see no denial of Uhrig's constitutional rights to effective trial counsel and to due process. Uhrig conducted his own trial and waived a jury. He is not a lawyer. Before trial the district court judge tried to "get counsel" for him. He refused, insisting that he wanted to represent himself. This was his right under 28 U.S.C. § 1654.[4] The judge complied with Rule 44, Federal Rules of Criminal Procedure.[5] At one pre-trial hearing the judge pointed out the difficulty a non-lawyer would have with evidentiary rules, and sought to protect him, "You do not know what you are into . . . you may feel competent but . . . ." At a later hearing the judge advised Uhrig of the possible penalties should Uhrig be found guilty. He told Uhrig he would not have to pay attorney's fees and arranged for the director of the Criminal Justice Act in the court district to offer services to Uhrig. But Uhrig persisted in exercising his right of self-representation. The judge expressly declined to force counsel upon Uhrig, was extremely patient in protecting him during the five day hearing and afforded him every opportunity to present his evidence effectively, even waiv-

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4. § 1654 provides:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. . . ."

5. Rule 44 reads, in relevant part:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

ing certain evidentiary rules. At the close of trial he commended Uhrig's performance in conducting his own trial. Surely this record shows no abuse of discretion and precludes any notion that Uhrig's waiver of his Sixth Amendment right was not knowingly or intelligently made or that he was denied due process of law. See Lowe v. United States, 418 F. 2d 100, 103 (7th Cir. 1969).

For the reasons given, the judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-332

JOSEPH H. UHRIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. After a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eight counts of mail fraud, in violation of 18 U.S.C. 1341.[1] On January 23, 1969, he was sentenced to imprisonment for eighteen months on each count, the sentences to run concurrently. The court of appeals affirmed on May 24, 1971 (Pet. App.). The instant petition was filed on June 24, 1971, and is out of time under Rule 22(2) of the Rules of this Court. In

[1] Petitioner was originally indicted on nine counts of mail fraud. However, one count was dismissed on motion of the government during the trial (R. 79). Robert Price, indicted with petitioner, was severed prior to trial. All charges against him were subsequently dismissed (R. 18, 91).

any event, the petition presents no question warranting review by this Court.

Petitioner, who does not contest the sufficiency of the evidence summarized in the opinion below (Pet. A1-A5), claims that he failed knowingly and intelligently to waive his right to counsel and that consequently, when it became apparent that he could not adequately defend himself, the trial judge should have *sua sponte* appointed counsel for him or, alternatively, terminated the trial.

On January 18 and 19, 1968, pretrial hearings were held on petitioner's motion to appear *pro se*.[2] Petitioner's counsel was present throughout these proceedings. The district judge explained the need for a lawyer, if only for his knowledge of the technical rules of evidence, and warned petitioner that the court itself could not act as his attorney (I H. 4). The judge tried to dis- by petitioner that "this is a decision that I would like to courage petitioner from appearing *pro se*, but was told stand by" (II H. 3). Despite further offers by the court to have counsel appointed to represent him or at least advise him at trial, petitioner insisted on his right to defend himself (II H. 4–5). Petitioner acknowledged his understanding of the charges and waived reading of the indictment (I H. 6). The judge then informed him of the maximum possible sentence and fine to which he

[2] The transcript of the proceedings held on January 18 (I H.) and January 19 (II H.) are found in a single volume presently on file with the Clerk of this Court. The five-volume trial transcript was certified by the court of appeals for filing in this Court but volume IV is missing.

was subject, and again urged petitioner to reconsider. Petitioner refused (II H. 10–11). Throughout the subsequent trial, the court carefully explained to petitioner various procedures, such as the reason for the exclusion of prospective witnesses or the purpose of opening arguments (*e.g.*, Tr. 5–9, 798). He counseled petitioner on the manner of refuting testimony (*e.g.*, Tr. 37, 48–49) and allowed him wide latitude in the use of evidence (*e.g.*, Tr. 45, 296). The trial judge even pointed out to petitioner that he could object to the admission of certain testimony elicited by the prosecution (Tr. 218).

2. The record reflects a consistent effort by the trial judge to safeguard petitioner in the assertion of his right to represent himself. When it became obvious, despite the many warnings of the court, that petitioner—noted by the court of appeals to be a "highly articulate and persuasive" man (Pet. App. A1)—would cling to his decision, the judge made certain that he understood the nature of the charge as well as the possible penalties which could be imposed. Petitioner was thus well aware of the burdens and potential consequences of proceeding *pro se* and exercised his choice with informed intelligence and understanding. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269; *Johnson* v. *Zerbst*, 304 U.S. 458; *Hodge* v. *United States*, 414 F. 2d 1040 (C.A. 9). In these circumstances, the trial judge had no choice but to proceed with the trial. *Lowe* v. *United States*, 418 F. 2d 100 (C.A. 7), certiorari denied, 397 U.S. 1048. And once the trial was in progress, the trial judge showed great

patience and afforded petitioner every opportunity to present his evidence effectively (Pet. App. A6). The trial judge was required to do no more.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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